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No. 84-1236 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners,

—v.—

CRAWFORD BULLOCK, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Respondent, Crawford Bullock, Jr., submits this Supplemental Brief to bring to the Court's attention a case decided after the submission of respondent's brief on the merits.

South Carolina has joined the growing number of states that have determined that the findings mandated by *Enmund v. Florida*, 458 U.S. 782 (1982), must be made *by the jury* before a death sentence may be imposed (*see* Brief for Respondent at 23-27). In reversing two death sentences, the South Carolina Supreme Court recently held:

> In *Enmund v. Florida*, 458 U.S. 782 (1982) the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty upon an individual who did not personally take life, attempt to take life, or intend that life be taken. During the penalty phase of death penalty cases which

involve conspiracy liability, *the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used.*

State v. Peterson, No. 22381, slip op. at 3-4 (S.C. Oct. 14, 1985) (per curiam) (emphasis added).[1]

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1 Thus, the last two paragraphs of footnote 33 on pages 26-27 of the Brief for Respondent should now read:

In all, of the 17 states indentified in *Enmund* as potentially authorizing unconstitutional death penalties, seven have taken steps to require *Enmund* findings before a death sentence can be imposed (six require such findings by the jury: Mississippi, South Carolina, Georgia, North Carolina, California, and (presumably) Oklahoma; one by the trial judge: Arizona); five appear to have taken the position that evidence in the record is sufficient and that express *Enmund* findings by the judge or jury are not required (Indiana, Wyoming, Tennessee, Idaho and Florida, although Florida has on occasion remanded a case for a trial court finding of the *Enmund* factors, *see Brumbley v. State*, 453 So. 2d 381 (Fla. 1984)); and the remaining five have not yet addressed the issue of who must make the *Enmund* findings (Nevada, Nebraska, Montana, Connecticut and South Dakota; Connecticut and South Dakota do not have any individuals on death row. *See* NAACP Legal Defense and Education Fund, *Death Row, U.S.A.* (August, 1985)).

Thus at most eleven—and perhaps as few as six—states potentially allow imposition of the death penalty without a finding by the jury of the *Enmund* factors. The fact that the vast majority of the 37 states with capital punishment statutes require *Enmund* findings to be made by the jury before a death sentence may be imposed further supports the conclusion that that procedure is required by due process. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968); *cf. Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

CONCLUSION

For the reasons stated in the Brief for Respondent, Bullock's death sentence was properly vacated by the Court of Appeals. The decision below should be affirmed.

Dated: New York, New York
October 28, 1985

Respectfully submitted,

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